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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 256

CADDO PARISH SCHOOL BOARD, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

No. 301

THE BOARD OF EDUCATION OF THE CITY OF BESSEMER, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions of the district court in No. 256 (I La.R. 291, 302; III La.R. 251, 261; IV La.R. 47; V La.R. 45; VI La.R. 63[1]; Pet. 44–76) are unreported.

[1] The references are to the separately paginated volumes of the record filed here in the Louisiana cases. Volume I relates to Caddo Parish, Volumes II and III to Bossier Parish, Volume IV to Jackson Parish, Volume V to Claiborne Parish, Volume VI to the City of Monroe, and Volume VII to East Baton Rouge Parish (involved in No. 282). Volume VIII contains the proceedings in the court of appeals.

The district court opinions in No. 301 (I Ala.R. 23, 52, 70; II Ala.R. 37, 41, 64, 85; III Ala.R. 65, 67, 71[2]) are also unreported. The first (panel) opinion of the court of appeals (VIII La.R. 17.; IV Ala.R. 6) is reported at 372 F. 2d 836; the opinion on rehearing *en banc* (VIII La.R. 244; IV Ala.R. 12) is not yet reported. Both opinions are printed as Exhibit "L", appended to the petition in No. 256[3].

JURISDICTION

The judgment of the court of appeals on rehearing (VIII La.R. 328; IV Ala.R. 13) was entered on March 29, 1967. The petition for a writ of certiorari in No. 256 was filed on June 16, 1967; and that in No. 301 was filed on June 27, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Court of Appeals for the Fifth Circuit correctly defined petitioners' constitutional duty to disestablish the dual systems of schools based on race and permissibly formulated a circuit-wide school desegregation decree.

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[2] These references are to the separately paginated volumes of the record filed here by the Alabama petitioners. Volume I relates to Jefferson County, Volume II to the City of Bessemer and Volume III to the City of Fairfield. Volume IV contains the proceedings in the court of appeals.

[3] Following the example of the petitioners, we shall refer to the pagination of the slip opinions as reproduced in the petition in No. 256, indicating the panel opinion as "Jefferson I" and the *en banc* opinion on rehearing as "Jefferson II."

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> * * * nor shall any State * * * deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT

The proceedings below. These school desegregation suits were brought in the Western District of Louisiana (No. 256) and the Northern District of Alabama (No. 301) by Negro children in 1965. The United States intervened in seven [4] of the suits pursuant to Section 902 of the Civil Rights Act of 1964 (42 U.S.C. 2000h–2).[5] In each instance, the district courts found that

[4] In two of the Louisiana cases, those involving Claiborne and Jackson Parishes, the United States intervened in the court of appeals. In the Bossier Parish, Louisiana, case, and in the three Alabama cases, involving Bessemer, Fairfield and Jefferson County, the United States intervened in the district court. In the Caddo Parish, Louisiana, case, the motion of the United States for leave to intervene was denied by the district court, but that ruling was reversed by the court of appeals in the instant decision.

The United States is not a party to the City of Monroe, Louisiana, suit, which is briefed in No. 256. Nor is it a party to No. 282, *East Baton Rouge Parish School Board* v. *Davis.* While we do not address ourselves to them here, an examination of these cases reveals no reason why the same principles should not govern them also.

[5] "Whenever an action has been commenced in any court of the United States seeking relief from the denial of equal protection of the laws under the fourteenth amendment to the Constitution on account of race, color, religion, or national origin, the Attorney General for or in the name of the United States may intervene in such action upon timely application if the Attorney General certifies that the case is of general public importance. In such action the United States shall be entitled to the same relief as if it had instituted the action."

the defendant school boards operated and maintained racially segregated school systems in violation of the Fourteenth Amendment as construed in *Brown* v. *Board of Education*, 347 U.S. 483, 349 U.S. 294, and ordered the school boards to submit desegregation plans.

The plans approved by the district court for the four Louisiana school boards involved in No. 256 were substantially similar. They provided that "initial assignments of pupils [to grades reached by the plan] * * * shall be made purely and simply on the basis of individual choice," reserving to the board, however, the right to reject choices and assign students to "comparable" schools closer to their residence. See, *e.g.*, Pet. 47. Although each plan recited that "the method of initial assignment herein provided for will, of course, be subject to all reasonable procedural requirements that may be adopted and promulgated by the * * * Board" (see, *e.g.*, Pet. 48), the procedure to be followed in the making of the initial assignments was nowhere spelled out. The plans in the Alabama cases provided for the continuation of initial assignments based on race, but allowed Negro students to apply for transfer to white schools. See, *e.g.*, I Ala. R. 30. The plans in all seven cases dealt only with the assignment of students. They made no provision for the elimination of racial discrimination in any other aspect of the school system, such as faculty, facilities, services and activities, transportation, construction, and consolidation.

In April 1966, the court of appeals, upon motion by the United States, grouped these cases together

for argument and set them down for expedited consideration. Oral argument was had in May 1966, and the judgment of the court of appeals was rendered on December 29, 1966. The court of appeals (District Judge Cox dissenting) reversed the district courts and remanded the cases for entry of a specific decree which was also to be used as a circuit-wide standard for school boards choosing to desegregate through use of a "freedom of choice" student assignment plan. The school boards' petition for rehearing *en banc* was granted by the court of appeals on February 9, 1967. Further briefs were submitted and on March 10, 1967, oral argument was had before the full court. In a *per curiam* opinion dated March 29, 1967, the court of appeals (three of the twelve judges dissenting and one concurring specially) adopted the opinion of December 29, 1966, adding only what it termed "clarifying statements" and making minor changes in the decree. On April 10, 1967 the court of appeals denied the motion of the school boards to recall the mandate. On April 17, 1967, this Court denied a stay.

The decision of the court of appeals. The court, in its *en banc* decision on rehearing, stated its basic conclusion in these words (*Jefferson* II, p. 5):

> The Court holds that boards and officials administering public schools in this circuit have the affiirmative duty under the Fourteenth Amendment to bring about an integrated, unitary school system in which there are no Negro schools and no white schools—just schools.

To achieve a unitary school system, the court held, school officials must do more than "offer Negro chil-

dren the opportunity to attend formerly all-white schools." *Ibid.* The entire system must be an integrated one, including faculties, facilities and activities. *Ibid.* Finding that uniform, circuit-wide standards were necessary in the interest of effective judicial administration in order to avoid variations between districts which have no reasonable explanation, and to prevent misunderstanding of its decision, the court attached to its opinion a decree to be entered in the cases before it and to be applied in other school desegregation cases in the Fifth Circuit upon motion by proper parties. *Jefferson* II, pp. 8–24.

The decree contains a "freedom of choice" desegregation plan—the method most public schools in the Fifth Circuit have chosen for desegregating their school systems (*Jefferson* I, p. 97)—under which school assignments are determined by the choice of students and parents. The court reaffirmed the position it had taken earlier[6] that in formulating the mechanics of the desegregation plan, it would give weight to the guidelines issued by the Commissioner of Education pursuant to Title VI of the Civil Rights Act of 1964,[7] although it did not consider itself "bound" by them.

Section I of the decree provides that all grades must be desegregated commencing with the 1967–68

[6] See, e.g., *Singleton* v. *Jackson Municipal Separate School District*, 348 F. 2d 729 (C.A. 5); *Price* v. *Denison Independent School District Board of Education*, 348 F. 2d 1010 (C.A. 5).

[7] Revised Statement of Policies for School Desegregation Plans under Title VI of the Civil Rights Act of 1964, United States Office of Education, 31 Fed. Reg. 5623.

school year. Section II sets forth the mechanics governing the exercise of a choice, stating who may exercise a choice, when it is to be exercised, how students and the public are to be notified, how priorities are to be determined when the number of choices exceeds available space in a particular school, and providing for a non-racial assignment of students who do not exercise a choice. Section III provides that students newly entering the school system are to have a free choice, and Section IV makes provisions for transfers in special cases. Section V prohibits racial discrimination in services, facilities, activites and programs of the school system, and Section VI obliges the school boards to equalize the schools traditionally maintained for Negroes. The decree also has provisions respecting school transportation (Section II), school construction (Section VII), and faculty assignments (Section VIII). Finally, provision is made for submitting reports to the district court so that the court and the parties will be able to determine how the decree is being carried out (Section IX).

ARGUMENT

I

THE COURT BELOW WAS CLEARLY CORRECT IN DEFINING THE CONSTITUTIONAL OBLIGATIONS OF PETITIONERS

We think it clear that *Brown* v. *Board of Education*, 347 U.S. 483, 349 U.S. 294, condemned not only compulsory racial assignments of public school students, but also, more generally, the maintenance of a dual public school system based on race—where one

set of schools is maintained for Negroes and the other for whites. The use of dual attendance zones based on race is only one aspect of school systems organized and structured on the principle of racial separation. That was, to be sure, an obviously discriminatory characteristic of the school systems to which *Brown* was addressed; but those segregated systems were tainted in other respects as well. The school authorities, as an integral part of furthering their policy to maintain separate schools for Negroes and whites, also allocated teachers, located new schools, determined the grades and capacity of schools, organized the school transportation system, and established interscholastic athletic leagues—to mention some examples—on the basis of racial segregation. It was this entire dual system that was condemned in *Brown*. See 349 U.S. 294, at 300–301.[8] What was envisaged was a transition from a dual system based on race to a unitary, non-racial system; a requirement obliging the boards to revise completely all aspects of the school system. See, also, *Bradley* v. *School Board*, 382 U.S. 103, 105; *Rogers* v. *Paul*, 382 U.S. 198; *Northcross*

[8] The Court there said:

"[T]he courts will require that the defendants make a prompt and reasonable start toward full compliance with our May 17, 1954, ruling. Once such a start has been made, the courts may find that additional time is necessary to carry out the ruling in an effective manner. * * * To that end, the courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems. * * *"

v. *Board of Education of City of Memphis*, 302 F. 2d 818, 823–824 (C.A. 6); *Kelley* v. *Altheimer, Arkansas Public School District No. 22*, No. 18, 528 (C.A. 8, decided April 12, 1967); cf. *Baldwin* v. *Morgan*, 287 F. 2d 750, 754 (C.A. 5). The present decree merely implements that principle.

Petitioners specifically challenge the decree insofar as it requires the desegregation of faculty and staff. Yet this provision is in keeping with the decisions of all the circuits, which, following this Court's decision in *Bradley* v. *School Board*, 382 U.S. 103, and *Rogers* v. *Paul*, 382 U.S. 198, have uniformly held the school board obliged to disestablish segregated patterns of faculty assignments attributable to the racial allocation of faculty under the dual system. *Clark* v. *Board of Education of Little Rock School District*, 369 F. 2d 661 (C.A. 8); *Board of Education of Oklahoma City Public Schools* v. *Dowell*, 375 F. 2d 158 (C.A. 10), affirming 244 F. Supp. 971 (W.D. Okla.), certiorari denied, May 29, 1967, No. 1268, O.T., 1966; *Wheeler* v. *Durham City Board of Education*, 363 F. 2d 738 (C.A. 4); *Singleton* v. *Jackson Municipal Separate School District*, 355 F. 2d 865 (C.A. 5). Desegregation of faculty and staff is, moreover, an essential step in the elimination of the dual school system when a "freedom of choice" plan for student assignment is in effect. For the basic requirement of such a plan is that it offer each student a completely "free" choice, uninhibited by a practice—past or present—of the board based on racial segregation. See *Stell* v. *Savanah-Chatham County Board of Education*, 333 F. 2d 55 (C.A. 5), certiorari denied *sub*

nom. Roberts v. *Stell*, 379 U.S. 933; *Kier* v. *County School Board of Augusta County*, 249 F. Supp. 239, 246 (W.D. Va.). And this standard cannot be met where the boards continue to maintain schools identifiable as "Negro" schools or "white" schools by the racial composition of their faculty and staff. As the district court in *Kier* said (249 F. Supp. at 246):

> It is not enough to open the previously all-white schools to Negro students who desire to go there while all-Negro schools continue to be maintained as such. Inevitably, Negro children will be encouraged to remain in "their school," built for Negroes and maintained for Negroes with all-Negro teachers and administrative personnel. See Bradley v. School Bd., supra, 345 F. 2d at 324 (dissenting opinion). This encouragement may be subtle but it is nonetheless discriminatory. * * *

Nor is it realistic to suppose that an entrenched dual school system rigidly segregated according to race will automatically give way to an integrated unitary system without affirmative action. It is not enough merely to desist discriminatory practices; positive measures must be undertaken by the school authorities to accomplish the conversion. Accordingly, the court of appeals was fully justified in requiring the local boards to take whatever measures are necessary to achieve desegregation, including desegregation of faculty and staff. And, in the circumstances, it is appropriate to test the adequacy of those measures by the practical results.[9]

[9] The assertion of the petitioners in No. 301 (pp. 13–14) that the judgment below will require the Bessemer, Alabama Board of Education to abandon free choice, and overrule the

II

THE COURT BELOW WAS CLEARLY CORRECT IN FORMULATING A DETAILED DESEGREGATION DECREE TO BE APPLIED THROUGHOUT THE CIRCUIT

The desegregation plans approved by the district courts in these cases were purportedly free choice plans. But they were inadequate, the court of appeals held, in part because they failed to specify the procedures and mechanics for the operation of a free choice system. That, in the court's view, was a serious defect, since experience has demonstrated that—

> When such plans leave school officials with a broad area of uncontrolled discretion, this method of desegregation is better suited than any other to preserve the essentials of the dual school system while giving paper compliance with the duty to desegregate. *Jefferson* I, p. 98.

That conclusion was supported by the record in these cases. Thus, although the plans in No. 256 (the Louisiana cases) stipulate that students would be assigned on a "freedom of choice" basis, the court found that, as administered by the board, they did no more

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choices of 3,202 Negro students, is wholly premature. The facts alleged in the petition are not in the record in this case; they have not been presented to the district court or court of appeals. If these allegations were submitted, we assume the district court would want to know much more, for example: how the Bessemer school board has assigned the over 1,600 Negro students who failed to exercise a choice; what choices have been exercised by white students, and where they have been assigned; how many teachers have been assigned on a non-segregated basis; what steps have been taken to equalize school facilities and curricula; and what further construction has taken place or is planned.

than "superimpose the same old transfer plan on racial assignments and dual zones." *Jefferson* I, p. 103. Nor can a free choice plan be effective to achieve a unitary system unless it contains "specific elements * * * that make it more than a mere word of promise to the ear." *Jefferson* I, p. 102. Accordingly, the court of appeals fashioned a specific decree and ordered its entry in each of the cases before it.

Complaint is made that the court also announced that the plan incorporated in the present decree would be used as a circuit-wide model. In light of what had gone before, however, that solution was wholly warranted. It is sufficient to quote the court's recitation of the experience which prompted the adoption of the expedient (*Jefferson* I, pp. 35–36):

> The first school case to reach this Court after *Brown* v. *Board of Education* was *Brown* v. *Rippey*, 5 Cir. 1956, 23[3] F. 2d 796. Since then we have reviewed 41 other school cases, many more than once. The district courts in this circuit have considered 128 school cases in the same period. Reviewing these cases imposes a taxing, time-consuming burden on the courts not reflected in statistics. An analysis of the cases shows a wide lack of uniformity in areas where there is no good reason for variations in the schedule and manner of desegregation. In some cases there has been a substantial time-lag between this Court's opinions and their application by the district courts. In certain cases—which we consider unnecessary to cite—there has even been a manifest variance between this Court's decision and a later district court decision. A number of district courts still mistak-

> enly assume that transfers under Pupil Placement Laws—superimposed on unconstitutional initial assignment—satisfy the requirements of a desegregation plan. The lack of clear and uniform standards to govern school boards has tended to put a premium on delaying actions. In sum, the lack of uniform standards has retarded the development of local responsibility for the administration of schools without regard to race or color. [Footnotes omitted.]

At all events, the court was scrupulous to protect the rights of parties not before it. Although the model decree is presumptively applicable to any school system that adopts a "free choice" plan, it remains open to any party to a particular case to show that exceptional circumstances compel modification of the decree. *Jefferson* I, pp. 111–112.

CONCLUSION

The court below correctly defined the petitioners' constitutional duty and ordered the entry of a specific decree in accordance with that duty. No substantial questions are raised by the petitions, and the writ of certiorari should be denied.

Respectfully submitted.

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